IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 5566 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GUJARAT STATE FOREST DEVELOPMENT CORPORATION LTD. - Petitioner
Versus
BUDHABHAI KAMJIBHAI NIZAMA - Respondent

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Appearance :

MR PRABHAV MEHTA for NANAVATI ASSOCIATES for Petitioner
MR MUKUL SINHA for Respondent

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 31/08/2006

ORAL JUDGMENT

1. Heard the learned Advocate, Mr.Prabhav Mehta, for Nanavati Associates, on behalf of the

petitioner and learned Advocate, Mr.Mukul Sinha, appearing on behalf of the respondent.

2. In the present petition, the petitioner Corporation has challenged the award passed by Labour Court, Baroda in Reference No.669 of 1988 Exh.25 dated 15.4.1999, whereby, Labour Court, Baroda has directed the petitioner to reinstate the respondent workman in service with continuity of service and with 50% back wages of interim period, with cost of Rs.2000/-.

3. This Court has not granted any stay against the reinstatement but, stay has been granted against the amount of back wages. In pursuance to the order passed by this Court on 13.7.2001, the respondent workman has been reinstated by petitioner Corporation in service and at present, he is working with the petitioner Corporation.

4. The dispute referred for adjudication on 4.8.1988 by the appropriate Government. The award

was published on 31.5.1999. This Court has passed an order on 13.7.2001, which is quoted as under :

> "1. RULE. There shall be stay of the impugned award as far as the payment of back wages and costs are concerned on the condition that the respondent shall be reinstated within a period of one month from today. The order of reinstatement shall be subject to the order that may be passed at the time of final disposal of this petition. The record and proceedings of the original Reference (LCV) No.669/88 disposed by the impugned award dated 15.4.1999 shall be called for from the Labour Court, Vadodara so as to reach this Court within one month. The matter shall be listed for final hearing on 16.8.2001."

5. Against the petition, affidavit in reply is filed by the respondent and against that, rejoinder is also filed by petitioner Corporation, which is at page-45.

6. Learned Advocate, Mr.Prabhav Mehta, submitted that it is admitted fact that respondent workman

was daily wager and, therefore, has no right to post. He also submitted that disengagement of the respondent workman is not covered by definition of retrenchment. He emphasized that while calculating 240 days, non-working days and holidays cannot be included for calculation of 240 days continuous service. He relied on Para.5 of the Apex Court's decision in case of Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation, reported in (1985) 4 SCC 71. He also submitted that for holiday or non-working days, if the daily wager is not able to get any wages, then, that cannot be included in the calculation of 240 days. He also submitted that workman has not proved that by positive action from petitioner Corporation the service of respondent workman has been terminated. No contrary evidence was produced by the workman on record. Therefore, according to him, Labour Court has committed gross error in setting aside termination order and granted the

reinstatement with 50% back wages. He relied upon certain decisions of Apex Court as well as High Courts. He has prepared a short note of each decisions which have been relied by him, which is quoted as under :

> "2006(2) GLR Page 1014(SC) – Surendranagar District Panchayat V/s.Dahyabhai Amarsinh:
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> The burden of proof lies on the workman to show that he had work continuously for 240 days in the preceding one year prior to his alleged retrenchment and it is for the workman to adduce evidence apart from examining himself to prove factum of his being in employment of the employer.
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> (1996) 10 SCC Page 597 – Allahbad Bank V/s.Premsing.
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> The instant case is not one where by passing any order the existing services of a workman were terminated. The respondent was given employment for one day at a time with the issuance of successive letters. The relationship between the parties being contractual, the term of contract was that the services stood terminated at the end

of the day. The Industrial Tribunal has not given any reason whatsoever as to what was the obligation on the appellant to employ the respondent. The status of the respondent was, at best, that of a daily wager. By virtue of his letters of employment he ceased to be employed at the end of each day. His day's service stood automatically terminated. Therefore, the decision of the Tribunal that the respondent should be deemed to have continued in service with the right to usual pay and allowances is clearly untenable. The respondent could not insist on his being continued to be employed and the appellant was under no legal obligation to employ him.

1997(2) LLN Page 982 (SC)- Himanshu Kumar Vidyarthi V/s. State of Bihar and others:

Section 25F-Retrenchment-Daily wage employees-Engaged on the basis of the needs of her-have no right to posts-the disengagement from service cannot be construed to be retrenchment under I.D.Act.

1998(2) GLR Page 1020 – Umeshkumar Manubhai Amin V/s.Dholka Nagarpalika.

Even if the services of daily wagers are being terminated in violation of provisions of Section 25F of the ID Act, still they do not acquire any right to hold the post. At the most they may be entitled for the notice pay or the retrenchment compensation, but their services will not be considered to be regular and permanent.

(2004) 8 SCC Page 151 – Rajasthan State Ganganagar S. Mills Ltd. V/s.State of Rajasthan-

Burden of proof as to completion of 240 days of continuous work in a year is on the workman.

(1995) 5 SCC Page 653- Morinda Cooperative Sugar Mills Ltd. V/s.Ramkishan and Ors.

Labour Law-Industrial Disputes Act, 1947- S.2(oo)(bb), 25-F and 25-H- workmen of sugar mills working during crushing seasons only (October/November to March/April in the following year)- Cessation of their work consequent to closure of the season, held, did not amount to retrenchment- Hence, High

Court's direction to reinstate them on account of non-compliance with S.25-F, held, illegal- However, in the next season such persons, if reporting for duty, directed to be engaged in accordance with seniority and exigency of work- Retrenchment.

(2005) 1 SCC Page 639- Mahendra L.Jain & Ors. V/s. Indore Development Authority & Ors.

Daily wagers hold no post- Regularization cannot be claimed as a right- Daily wager in the absence of the statutory provision in this behalf would not be entitled to regularization.

(2006) 1 SCC Page 530- Regional Manager, SBI V/s. Rakeshkumar Tiwari.

Held, if the plea in respect of section 25-G is not put forward , the opportunity for leading evidence thereon is denied, for no amount of evidence can be looked into unless a plea is raised. Respondent workman not having raised any plea in respect of violation of section 25-G or that termination of their services was illegal, if was not open to criminal to go

off on a tangent and conclude that termination of service of respondents was invalid.

(1997) 11 SCC Page 521 – Escorts Limited V/s. Presiding Officer & Anr.

Terms of appointment enabling the employer to terminate the service at any stage without assigning any reason- In such circumstances, termination of service under the said terms though effected before the expiry of the specified period, held did not amount to retrenchment.

Beyond the scope of reference-(1972) 1 SCC Page 691- The Jaipur Udyog Limited V/s. The Cement Work Karmachari Sangh, Sahunagar.

(1978) 1 SCC Page 235-Precision Bearings India Ltd. V/s. Baroda Mazdoor Sabha & Anr.“

Except that, no other submission is made and no other decision is relied by him.

7. Learned Advocate, Mr.Mukul Sinha, submitted

that matter can be looked into by two ways. He submitted that workman has satisfactorily proved Section 25B(1) and remained in service for a period without interruption and petitioner Corporation has not proved any kind of interruption in service of the workman by leading proper evidence before the Labour Court. Therefore, he submitted that respondent workman has satisfactorily proved continuous service as defined under Section 25(B)(1) of the I.D.Act,1947. He also submitted that statutory provisions entitles the workman to have weekly off as well as public holiday under the provisions of Rule 23 of Minimum Wages Act. Therefore, whatever the wages has been paid to the workman by the employer, it includes the wages of weekly off and public holiday. Therefore, according to him, even Section 25(B)(1) is satisfied by the workman if weekly off and other holidays are included in the calculation of 240 days continuous service. He also submitted that workman remained in service from

January,1983 to November,1986 working as a daily wager. During this service period, the service of respondent workman was not interrupted by any other reason by the Corporation. Therefore, he submitted that if the workman has satisfied the definition of continuous service as specifically mentioned in Section 25(B)(1) of I.D.Act,1947, then also, he is entitled the benefit of Section 25F of the I.D.Act,1947. He also submitted that workman has already been reinstated by the petitioner Corporation and he is working with the Corporation and juniors to respondent workman, have been regularized by petitioner Corporation. These facts have been mentioned in the affidavit filed by respondent workman. Learned Advocate, Mr.Prabhav Mehta, submitted that facts which are mentioned in the affidavit-in-reply by respondent workman, are categorically denied by the petitioner Corporation in Para.4 of the rejoinder. Learned Advocate, Mr.Mehta, submitted that name which has been suggested in affidavit-in-reply, a specific detail has been

given by Corporation that the workmen, whose names are mentioned, are not similarly situated to the respondent workman. Therefore, according to him, no junior to the respondent workman has been regularized by Corporation. Except this, learned Advocate, Mr.Mukul Sinha, has not made any other submission and relied upon any other decision.

8. I have considered the submissions made by both the learned Advocates and have also perused the award passed by Labour Court, Baroda in Reference No.669 of 1988. Before the Labour Court, workman had filed statement of claim vide Exh.3. According to respondent workman, he was working for more than 3 years as a Packing Helper and his work was found satisfactory, even though without giving any notice or warning the service of workman was terminated by oral order. Therefore, the demand was raised to reinstate the respondent workman with continuity of service with full back wages of interim period. The

petitioner Corporation has filed reply Exh.12/1 denying the averments made in the statement of claim by the respondent workman. According to petitioner Corporation, respondent workman was working in godown at Nandesari w.e.f. 1986. He completed 213 days in the year 1986 and in the year 1987 he completed 126 days continuous service and thereafter, workman has not reported for work w.e.f. 19.11.1987. According to Corporation, no positive action / termination order has been issued against the respondent but, workman has left the job. Therefore, according to Corporation, the reference is required to be dismissed. Before the Labour Court, the respondent workman was examined vide Exh.11. Thereafter, on behalf of petitioner, one list of documents was produced vide Exh.15 and vide Exh.16, certain documents were produced on record by petitioner. Thereafter, workman was cross-examined by petitioner Corporation vide Exh.17 and one witness Shrinivas was examined by petitioner vide Exh.20. Thereafter, the matter

was kept for arguments of both the learned Advocates. The Labour Court has framed the issue and decided the issue in Para.6. The Labour Court has considered the presence register produced by petitioner and come to the conclusion that workman remained in service, according to presence register, in the year of 1986 for 213 days and in the year 1987 working days are 126. The evidence of the workman vide Exh.11 specifically made it clear that his service was terminated by petitioner on 3.12.1987. According to presence register, the presence was marked upto 13.11.1987. Thereafter, no presence was marked in respect to respondent. According to workman, he was taken back in service after termination w.e.f. 3.5.1988 and thereafter, he was transferred to other place but, petitioner Corporation remained silent about this averment made by the respondent workman. The petitioner Corporation has not produced any muster from 3.5.1988 before the Labour Court. Therefore, the Labour Court has come to the conclusion that if

the workman was taken back in service from 13.11.1987 on 3.5.1988 and muster for that period was not produced by petitioner Corporation, therefore, Labour Court has come to conclusion that service of the workman was terminated by petitioner. The Labour Court has considered the decision of the Apex Court and also considered the decision in the case of Workmen of American Express International Banking Corporation (supra) and come to conclusion that considering the weekly off and public holidays, if it is included in total working days of 213 days which comes to 240 days. There is no dispute raised by petitioner before the Labour Court about the working days of 213 in the year 1986. Therefore, the Labour Court has come to conclusion that relying upon the decision of Apex Court in case of Workmen of American Express International Banking Corporation (supra) that workman had satisfied the condition of Section 25(B)(2) of the I.D.Act,1947. In respect to contention raised by petitioner Corporation that workman has left

the job and not reported for work after 13.11.1987, the Labour Court has considered that no letter has been written by the petitioner Corporation to the respondent about his absence from duty and no steps have been taken by petitioner Corporation if the workman had abandoned the job according to the case of the petitioner. Thereafter, the Labour Court has considered the question of back wages relying upon the evidence of workman and granted 50% back wages of interim period.

9. The arguments which have been advanced by petitioner before this Court relying upon the decision in respect to daily wager, continuous service, 240 days and legal right of daily wager. Looking to the award as it is, none of the contentions were raised by petitioner before the Labour Court. No such submissions were made before the Labour Court by petitioner Corporation. On the contrary, the working days of 213 days in the year 1986 and 126 days in the

year 1987 has been admitted by petitioner Corporation. The petitioner Corporation has not relied upon any of the decision which has been relied by him before this Court. This Court is examining the legality and validity of the award in question on the ground that whether any error has been committed by Labour Court while passing such award or not. The submission which was not made before the Labour Court by the petitioner, naturally, the Labour Court should not have to deal with such submissions and now to argue this question that Labour Court award is bad because daily wager has no right to the post, 240 days continuous service was not established, service of the workman was not terminated by positive action, no such submissions were mentioned or argued by the petitioner Corporation before the Labour Court. Therefore, considering these undisputed facts, whether the award passed by Labour Court is bad or not, is required to be examined by this Court. It is not the case of the petitioner Corporation before this Court that

these all submissions were made before the Labour Court and none of the submissions were considered by Labour Court, Baroda. However, apart from these facts, since the submissions raised before this Court, therefore, this Court is examining the same which have been raised by petitioner Corporation. The respondent workman is covered by definition of Section 2(s) of the I.D.Act,1947. The workman had completed continuous service of 213 days, as per the record produced by Corporation. It is necessary to note one important aspect that in cross-examination of the workman by learned Advocate appearing on behalf of Corporation, a specific question was asked to the workman that he had not completed 232 days continuous service in the year 1986 and 198 days in the year of 1987. In cross-examination, the workman has made it clear that his service was terminated on 3.12.1987 by petitioner Corporation. The evidence of Corporation is at Exh.20 wherein the Secretary of Corporation was examined. According to evidence of Corporation,

the workman was not working as a daily wager but, he was working as Hangami Kamdar but, payment has been made on the basis of daily wage. The workman was appointed in January,1986. He was not made permanent by Corporation and from November,1987, he abandoned the job. The witness of petitioner Corporation admitted that Minimum Wages Act is applicable to the petitioner Corporation and minimum wages were paid to the respondent workman and bonus is also paid to the respondent workman. No notice was given to the respondent workman by the petitioner Corporation. So, from the evidence of the petitioner Corporation, the fact was proved before the Labour Court that no written order of appointment was given to the workman and no termination order was given to the workman. Both the things have been done by oral order of the petitioner Corporation.

10. In view of these facts, the decision which has been relied by learned Advocate, Mr.Prabhav Mehta, that daily wager is not covered by

definition, not entitled to the post and it is day-to-day engagement of the workman by Corporation, from morning the service was engaged and in the evening, his service discontinued by Corporation. The termination cannot be considered to be retrenchment and when daily wager was not entitled to the post, therefore, question of reinstatement does not arise. Against this submission, the decision of Apex Court in case of Rattan Singh Vs. Union of India, reported in (1997) 11 SCC 396 wherein it is held that, “Section 25F of the Act is applicable to termination of even a daily-rated workman who had continuously served for the requisite statutory minimum period in a year. Hence, termination of service of such a workman without complying with Section 25F, is held illegal.” So, in view of the aforesaid decision, provision of Section 25F I.D.Act,1947 is applicable to the daily wager and non-compliance of Section 25F of the I.D.Act,1947 rendered the termination order *ab initio void.* Similar aspect has also been considered by Apex

Court in case of Mohan Lal Vs. The Management of M/s. Bharat Electronics Ltd. reported in AIR 1981 SC 1253 wherein the Apex Court has considered that in case termination amounts to retrenchment without complying the provisions of Section 25F of the I.D.Act,1947, then, such termination order is *ab initio void.* Relevant observations are in Para.16 and 17, which are quoted as under :

> "16. Appellant has thus satisfied both the eligibility qualifications prescribed in Section 25F for claiming retrenchment compensation. He has satisfactorily established that his case is not covered by any of the excepted or excluded categories and he has rendered continuous service for one year. Therefore, termination of his service would constitute retrenchment. As precondition for a valid retrenchment has not been satisfied the termination of service is ab initio void, invalid and inoperative. He must, therefore, be deemed to be in continuous service.
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> 17. The last submission was that looking

to the record of the appellant this Court should not grant reinstatement but award compensation. If the termination of service is ab initio void and inoperative, there is no question of granting reinstatement because there is no cessation of service and a mere declaration follows that he continues to be in service with all consequential benefits. Undoubtedly, in some decisions of this Court such as Ruby General Insurance Co. Ltd. v. P. P. Chopra. (1970) 1 Lab LJ 63 and Hindustan Steel Ltd., Rourkela v. A. K. Roy, (1970) 3 SCR 343 : (AIR 1970 SC 1401) it was held that the Court before granting reinstatement must weigh all the facts and exercise discretion property whether to grant reinstatement or to award compensation. But there is a catena of decisions which rule that where the termination is illegal especially where there is an ineffective order of retrenchment, there is neither termination nor cessation of service and a declaration follows that the workman concerned continues to be in service with all consequential benefits. No case is made out for departure from this normally accepted approach of the Courts in the

field of social justice and we do not propose to depart in this case."

11. It is not the case of the petitioner Corporation that such kind of termination is covered by exception of Section 2(oo) of the I.D.Act,1947. Therefore, such kind of termination is satisfied the requirement of Section 2(oo) of the I.D.Act,1947 and, therefore, it amounts to retrenchment. If workman day-to-day engaged and each day appointment and termination, then, Corporation has to pay daily payment to workman. But in this case payment was not made. The monthly payment made to the workman. So the defence of Corporation about day-to-day engagement is false and afterthought as well as contrary to record. The provision of Section 25(B)(1) of the I.D.Act,1947 has been considered by this Court in case of Moti Ceramics Industries V/s. Jivuben Rupabhai, 2000 II CLR 156, wherein it is held that the cessation of work cannot be considered to be termination as decided

by this Court in case of D.S.Vasavada v. Regional P.F. Commissioner, Gujarat reported in 1985 (1) GLR 499. The decision of Single Judge in S. R. Bharai V/s.Union of India reported in 2006 II CLR 167. Section 25B (1) of the I.D.Act,1947 is satisfied by the workman remaining in service from January,1986 to 3.12.1987. It is not the case of petitioner Corporation that during this period from January,1986 to December,1987, for even a single day, the service of workman was terminated by the corporation or interrupted being an unauthorized absence or any other reason. If the cessation of work during this entire period is not due to fault on the part of workman, then, it amounts to continuous service as defined under Section 25B (1) of the I.D.Act,1947. The period of one year continuous

service has been completed by the workman while remaining in service from January,1986 to 3.12.1987. Therefore, Section 25F of the I.D.Act,1947 requires that if the workman is remained in continuous service not less than one

year, then, his service cannot be terminated without complying with the provisions of Section 25F of the I.D.Act,1947. The provision of Section 25F I.D.Act,1947 has not made clear that 240 days continuous service is necessary. Section 25F where no workman employed in any industry who has been in continuous service for not less than on year under employer, shall be retrenched by that employer unless and until Clause (a), (b) and (c) is required to be complied with by Corporation. From the perusal of record produced by petitioner Corporation, the respondent workman was employed by petitioner Corporation, who has been in continuous service from January,1986 to 3.12.1987 for not less than one year under the petitioner Corporation, whose service has been terminated by way of retrenchment and non compliance of Section 25F of the I.D.Act,1947 itself render the termination *ab initio void.* In such circumstances, merely declaration is enough, not required to be even set aside the termination order. The condition precedent must have to be satisfied under Section 25F of the I.D.Act,1947

if it is not satisfied, then, that itself is enough to declare that termination order is *ab initio void.* Therefore, considering this fact from record, not less than one year service has been proved within the meaning of Section 25B(1) of the I.D.Act,1947.

12. Recently also, the Division Bench of Delhi High Court has considered the scope of Section 25(B)(1) of the I.D.Act,1947 in case of Surajpal Singh Vs. The Presiding Officer and another reported in 2006 Lab.I.C. 601. Relevant Para.27, 28, 29 and 30 are quoted as under :

> “27. Sections 25B(1) of the Act being beneficial and welfare provision has to be liberally and broadly interpreted, yet at the same time we cannot amend and modify a statutory provision by incorporating and adding words. Out role is to interpret the law as it exists and not to add and subtract words already used by the Legislature or usurp the role of the Legislature. The Legislature in Section 25B(2) has referred to period of 240 days in the preceding year following the date of termination as the criteria to

determine and decide whether a workman has been in continuous service for a period of one year. The Legislature, however, has deliberately not mentioned the period of 240 days during the period of one year as the criteria in Section 25B(1) of the Act. Section 25B(1) no where specifies that if a workman has worked for a period of 240 days in a period of one year, he is deemed to be in uninterrupted service for one year. The period of 240 days specified in Section 25B(2), cannot be legislated and read into sub-section (1)We cannot, therefore, legislate and incorporate the words 240 days into Section 25B(1) of the Act. Our judicial pen cannot write these words into the aforesaid sub-section and read then in Section 25B(1), when the Legislature has consciously and deliberately not used those words. The requirement of Legislature, as far as Section 25B(1) of the Act is concerned, is clear and unambiguous. It refers to continuous or uninterrupted service for a period of one year i.e 12 consecutive months. We cannot by judicial interruption decrease this period of 365 days to 240 days. Of course the period of one year should be interrupted liberally as has been done in the present judgment. The two

judgments, in the case of Moti Ceramic Industries (2000 Lab IC 1921)(Guj)(supra) and Metal Powder Co.Ltd. (1985 (2) Lab LJ 376) (Mad)(Supra) support and have similarly interpreted Section 25B(1) and (2) of the Act. Bombay High Court in the case of New Great Eastern Spinning and Weaving Co.Ltd., V/s. Vasant Mahendeo Bidia reported in 2005(1) Cur LR 50has also taken a similar view.

28. We wish to further clarify that the above interpretation is not against workmen. The Legislature has been careful and cautious to include certain periods like authorized leave, legal strikes, lock outs, periods during which the employer illegally refuses to permit the workman to do work etc. as a period during which the workman is deemed to be in continuous or uninterrupted service. Therefore, in a given case, a workman may have worked for in fact less than 240 days, but after including the specified periods mentioned in Section 25B(1), his continuous or uninterrupted service might be for a period of 12 consecutive months. Accordingly, we hold that period of 240 days is not relevant as far as Section 25B(1) is concerned as the figure 240 days

is not mentioned in the said sub-section and is mentioned only in sub-section (2). It is not possible for this Court to legislate and add the words 240 days in Section 25B(1) of the Act.
Section 25B (2) of the Act:

29. Sub-Section (12) of Section 25B also incorporates a deeming fiction. As per sub-section (2) to Section 25B, if a workman has worked for 240 days or 190 days (in case he is employed below ground in a mine) during the period of 12 calender months preceding the date with reference to which calculation is to be made, he shall be deemed to be in continuous service for a period of one year. In case of retrenchment, the reference date will be the date on which the retrenchment order is passed. Therefore, if a workman has worked for 240 days (190 days in case he has worked below ground in a mine) during the period of 12 calender months preceding the date of his retrenchment, the said workman is deemed to have rendered continuous service for a period of one year. Section 25B(2) refers to a period of 12 months immediately preceding and counting back wages from the relevant date and not to any other period

of employment. If a workman has worked for more than 240 days during this period of 12 months prior to his retrenchment, he is deemed to be in continuous service for a year. The words preceding the date with reference to which calculation is to be made are not redundant or otiose. The period of 12 months mentioned in Section 25B (2) is not therefore any period of 12 months but the immediately preceding 12 months with reference to which calculation is to be made.
The two clauses 25B (1) and 25B (2) in operation.

30. Section 25B(2) as per the clause itself, comes into operation when a workman has not been in continuous service within the meaning of Sub-Section (1) for a period of one year. However, in practice and for all practical purposes a workman will be entitled to protection under Section 25F of the Act, if conditions mentioned in either of the two clauses are satisfied. The Sub-Sections are therefore in alternative. Requirement of Section 25B (1) is uninterrupted service for a period of one year and Sub-Section 2 requirement is service for a period of 240 days (or 190 days in case worker is employed below

> ground in a mine) during the preceding 12 calendar months prior to the date of termination/ retrenchment. By deeming fiction in Section 25B (2), the workman who has worked for aforesaid period in the preceding 12 calendar month prior to the date of termination/retrenchment is deemed to have been in continuous service for not less than one year. The two provisions, namely, of Section 25B(1) and 25B(2) are separate and distinct. The requirements and conditions to be satisfied to some extent are also different.“

13. Now, I am considering the second aspect, as to whether the workman had completed 240 days or not. Looking to the record, 213 days in the year 1986 and 126 days in 1987 and relying upon the decision of the Apex Court in Workmen of American Express International Banking Corporation (supra), the workman is entitled to include the public holidays and weekly off which being necessary under the provision of Rule 23 of the Minimum Wages Act,1948. The workman under the provisions of Rule and Minimum Wages Act entitled weekly off and public holiday with salary if he

had worked full week as statutory wages. Therefore, days of weekly off and public holiday workman has received statutory wages so such days must have to be included in actual working days. According to petitioner Corporation, the salary was paid on the basis of minimum wages notification to the respondent workman. This was the statement made by Secretary of the petitioner Corporation vide Exh.20 before the Labour Court that the wages was paid to the workman under Minimum Wages Act. The component of minimum wages under the notification taken into account the weekly off and other public holidays in which period the workman should have not have to work with the employer. Therefore, whatever the minimum wages fixed by the State Government under the said notification includes wages of the weekly off and public holidays. Therefore, Para.5 of the Workmen of American Express International Banking Corporation is applicable to the facts of this case because the workman has received the wages of weekly off under the notification of

State Government as per Minimum Wages Act,1948. Relevant para.5 is quoted as under :

> “5. Section 25-F of the Industrial Disputes Act is plainly intended to give relief to retrenched workmen. The qualification for relief under S. 25-F is that he should be a workman employed in an industry and has been in continuous service for not less than one year under an employer. What is continuous service has been defined and explained in S. 25-B of the Industrial Disputes Act. In the present case, the provision which is of relevance is S. 25-B(2)(a)(ii) which to the extent that it concerns us, provides that a workman who is not in continuous service for a period of one year shall be deemed to be in continuous service for a period of one year if the workman. during a period of twelve calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than 240 days. The expression which we are required to construe is 'actually worked under the employer. This expression, according to us, cannot mean

those days only when the workman worked with hammer, sickle or pen, but must necessarily comprehend all those days during which he was in the employment of the employer and for which he had been paid wages either under express or implied contract of service or by compulsion of statute, standing orders, etc. The learned counsel for the Management would urge that only those days which are mentioned in the Explanation to S. 25-B(2) should be taken into account for the purpose of calculating the number of days on which the workman had actually worked though he had not so worked and no other days. We do not think that we are entitled to so constrain the construction of the expression 'actually worked under the employer'. The explanation is only clarificatory, as all explanations are, and cannot be used to limit the expanse of the main provision. If the expression 'actually worked under the employer' is capable of comprehending the days during which the workman was in employment and was paid wages - and we see no impediment to so construe the expression - there is no reason why the expression should be limited by the explanation. To give it any

other meaning then what we have done would bring the object of S. 25-F very close to frustration. It is not necessary to give examples of how S. 25-F may be frustrated as they are too obvious to be stated."

14. Recently, the Division Bench of Rajasthan High Court has considered the included weekly off in 240 days in case of Ramkishan Gurjar Vs. State of Rajashtan and another reported in 2006 LLR 301. Relevant Para.2 and 3 are quoted as under :

"2. Learned Counsel for the appellant canvassed that the workman can claim that he has worked on Sundays in the eyes of law, even though he may not have actually worked. Sundays (Holidays) should be counted as actual working days for the purpose of calculating 240 days. Reliance is placed on Dy.Chief Life Warden Bharatpur v. Judge Labour Court, Bharatpur, 1999 (1) Raj LR 250; Dhyan Singh v. University of Rajasthan, 1991 (1) Raj LR 793; Babu Lal Sharma v. University

of Ajmer, 1989 (1) Raj LR 624. He has also contended that the Forest Department is an Industry as has been held by the Hon'ble Supreme Court in Chief Conservator Forests v. Jagannath Maruli Kondhare, (1996) 1 Lab LJ; 1223 (1996) Lab IC 987).

3. Having heard the rival submissions, we find that in view of the settled proposition of law the calculation of working days by employer, excluding Sundays, is taint of malice and Sundays should be counted as actual working days for the purpose of calculating 240 days. The Labour Court has not committed any illegality in passing the award particularly when the respondents did not care to file any reply to the statement of claim nor any evidence was produced by them before the Labour Court. Therefore, the impugned order of learned Single Judge is not sustainable in view of the settled proposition of law.”

15. In view of both the aspects, the workman has satisfied the requirement under Section 25(B)(1) and (2) of the I.D.Act,1947 and non-compliance of Section 25F of the I.D.Act,1947 is undisputed before the Labour Court. Therefore, natural consequence has to be reinstatement with continuity of service. Certain decisions have been relied by learned Advocate, Mr.Mehta. The Surendranagar District Panchayat Vs. Dahyabhai Amarsinh reported in (2005) 8 SCC 750. Relevant Para.8 which is quoted as under :

> “8. To attract the provisions of Section 25F, one of the condition required is that the workman is employed in any industry for a continuous period which would not be not less than one year. Section 25B of the Act defines continuous service for the purposes of Chapter V-A "Lay-off and Retrenchment". The purport of this Section is that if a workman has put in an uninterrupted service of the establishment, including the service which may be interrupted on account of sickness, authorized leave, an accident, a strike

which is not illegal, a lock-out or cessation of work, that is not due to any fault on the part of the workman, shall be said to be a continuous service, for that period. Thus the workmen shall be said to be in continuous service for one year i.e., 12 months irrespective of the number of days he has actually worked with interrupted service, permissible under Section 25B. However, the workmen must have been in service during the period, i.e., not only on the date when he actually worked but also on the days he could not work under the circumstances set out in Sub-Section (1). The workmen must be in the employment of the employer concerned on the days he has actually worked but also on the days on which he has not worked. The import of Sub Section(1) of Section 25B is that the workmen should be in the employment of the employer for the continuous, uninterrupted period for one year except the period the absence is permissible as mentioned hereinabove. Sub-section (2) of Section 25B introduces the fiction to the effect that even if the workman is not in continuous service within the meaning of Clause (i) of Section 25-B for the period of one year or six months he shall be

> deemed to be in continuous service for that period under an employer if he has actually worked for the days specified in clause (a) and (b) of Sub-s(2). By the legal fiction of Sub-s2(a) (i), the workmen shall be deemed to be in continuous service for one year if he is employed underground in a mine for 190 days or 240 days in any other case. Provisions of the Section postulate that if the workmen has put in at least 240 days with his employer, immediately prior to the date of retrenchment, he shall be deemed to have served with the employer for a period of one year to get the benefit of Section 25F."

16. The Apex Court, in aforesaid case, has considered Section 25(B)(1) of the I.D.Act,1947 and decided that the import of Sub Section(1) of Section 25B is that the workmen should be in the employment of the employer for the continuous, uninterrupted period for one year except the period the absence is permissible as mentioned hereinabove. Sub-section (2) of Section 25B introduces the fiction to the effect that even if the workman is not in continuous service within

the meaning of Clause (1) of Section 25-B for the period of one year or six months he shall be deemed to be in continuous service for that period under an employer if he has actually worked for 240 days. Therefore, considering these observations made by the Apex Court and considering the facts which are on record before the Labour Court, it was not the case of petitioner Corporation that during the period from January,1986 to 3.12.1987, the service of respondent workman was terminated by Corporation or interrupted by the employer which was not covered within the Section 25(B)(1) of the I.D.Act,1947. Therefore, it is proved before the Labour Court that workman remained in continuous service without interruption as specified in that Section for a period of more than 1 year, even though Section 25F of the I.D.Act,1947 has not been followed by petitioner Corporation.

17. In respect to the contention that daily wager has no right to post and service cannot be construed to be retrenchment. These are the facts

which are contrary to the statutory provisions itself. Each day engagement of workman in absence of written order and monthly payment of wages, then, naturally such submission cannot be accepted by this Court. It is not the case of petitioner Corporation that each day, written order was communicated to the workman by the Corporation and at the end of the day, termination order was communicated to the workman. In the evidence of petitioner Corporation vide Exh.20, no evidence was led by Corporation before the Labour Court that workman was appointed each day and even his service was terminated by Corporation. No such correspondence on record has been produced by petitioner about engagement or disengagement in a one day. Evidence of the Corporation vide Exh.20 suggests that workman was not working as a daily wager but, he was working as Hangami Kamdar. That was the evidence of Shrinivas on behalf of Corporation but, his salary was paid monthly on daily wage basis. The theory which has been developed by the Corporation itself is contrary

to their evidence led before the Labour Court. Therefore, the decision which has been relied by learned Advocate, Mr.Prabhav Mehta, is not applicable to the facts of this case which are on record before the Labour Court and, therefore, I am not accepting the submissions which have been made by him. The decisions which have been relied by Mr.Mehta are not applicable to the facts which are not on record.

18. In respect of the positive action on the part of the Corporation about termination, the Labour Court has considered that if the workman has not reported for work, who was working as Hangami Kamdar, then, it was a duty on the part of the Corporation to write a letter to the respondent workman informing that as to why he is not reporting for work. To remain absent without any prior permission amounts to misconduct. Some sort of inquiry is necessary, so that workman is made aware about the fact that Corporation has noted his absence and on that ground, action may be justified to the Corporation by giving answer to

such notice. No such procedure was followed by Corporation before terminating service of respondent workman which is also contrary to the principles of natural justice. Therefore, on all the counts, the Labour Court has rightly examined the issue and come to the conclusion that termination is contrary to Section 25F of the I.D.Act,1947 and not to written letter to the respondent workman when he remained absent, amounts to terminating the service of respondent workman which clearly established an implied positive action not to take action against respondent workman amounts to termination by positive stand of Corporation. Therefore, Labour Court has rightly decided the dispute and for that, Labour Court has not committed any error which requires any interference by this Court.

19. However, learned Advocate, Mr.Prabhav Mehta, submitted that Labour Court has committed gross error in granting 50% back wages of interim period. The Labour Court has considered the evidence of the workman, some part of gainful

employment admitted by the workman which has been taken into account and no evidence has been produced by Corporation to justify the gainful employment of the workman. Therefore, considering the facts on record, the Labour Court has granted only 50% back wages of interim period. Therefore, according to my opinion, this being a proper consideration and exercised discretionary jurisdiction by Labour Court in granting 50% back wages of interim period, for that Labour Court has not committed any error while passing such order.

20. Learned Advocate, Mr.Prabhav Mehta, failed to establish or point out any infirmity in the award and, therefore, according to my opinion, the Labour Court has not committed any error which requires any interference by this Court on the ground that finding of fact recorded by Labour Court is on the basis of evidence. This Court cannot disturb the finding of fact unless it is perverse. Considering this fact, no apparent error on the face of record has been committed by

Labour Court which requires any interference by this Court while exercising the power under Article 227 of the Constitution of India. Therefore, according to my opinion, the Labour Court has rightly passed an award and no error has been committed by the Labour Court.

21. This Court having very limited jurisdiction under Article 227 of the Constitution of India, the finding of facts cannot be disturbed unless it perverse. This aspect has been considered by the Apex Court in Laxmikant Revchand Bhojwani and another Vs. Pratapsing Mohansingh Pardeshi, reported in (1995) 6 SCC 576. Relevant observations made by the apex court in para 9 of the said judgment are therefore reproduced as under:

> “9. The High Court under Article 227 cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles

of law or justice, where grave injustice would be done unless the High Court interferes. “

22. In Ouseph Mathai and Others versus M. Abdul Khadir, reported in (2002) 1 SCC 319, the Apex Court observed as under in para 4 and 5 :

“4. It is not denied that the powers conferred upon the High Court under Articles 226 and 227 of the Constitution are extraordinary and discretionary powers as distinguished from ordinary statutory powers. No doubt Article 227 confers a right of superintendence over all courts and tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said Article as a matter of right. In fact power under this Article cast a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and

that they do not cross the limits, ensuring the performance of duties by such courts and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this Article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party.

5. In Waryam Singh v. Amarnath (1954 SCR 565) this Court held that power of superintendence conferred by Article 227 is to be exercised more sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors. This position of law was reiterated in Nagendra Nath Bose v. Commr. of Hills Division (1958 SCR 1240). In Bhahutmal

Raichand Oswal v. Laxmibai R. Tarta (AIR 1975 SC 1297) this Court held that the High Court could not, in the guise of exercising its jurisdiction under Article 227 convert itself into a Court of appeal when the Legislature has not conferred a right of appeal. After referring to the judgment of Lord Denning in R v. Northumber Compensation Appeal Tribunal, Exparte Shaw (1952 (1) All ER 122, 128) this Court in Chandavarkar Sita Ratna Rao v. Ashalata S. Gurnam held : (SCC p.460 para 20)

"20.It is true that in exercise of jurisdiction under Article 227 of the Constitution the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a view of fact taken in the teeth of preponderance of evidence. But the High Court should decline to exercise its jurisdiction under Articles 226 and 227 of the Constitution to

look into the fact in the absence of clear and cut down reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a finding within the jurisdiction of the inferior tribunal except where the findings are perverse and not based on any material evidence or it resulted in manifest injustice (see Trimbak Gangadhar Teland 1977 (2) SCC 437). Except to the limited extent indicated above, the High Court has no jurisdiction. In our opinion therefore, in the facts and circumstances of this case on the question that the High Court has sought to interfere, it is manifest that the High Court has gone into questions which depended upon appreciation of evidence and indeed the very fact that the learned trial Judge came to one conclusion and the Appellate Bench came to another conclusion is indication of the position that two views were possible in this case. In preferring one view to

another of factual appreciation of evidence, the High Court transgressed its limits of jurisdiction under Article 227 of the Constitution. On the first point, therefore, the High Court was in error."

23. In case of Roshan Deen versus Preeti Lal, reported in (2002) 1 SCC 100, the Apex Court observed as under in paragraph 12:

"12. We are greatly disturbed by the insensitivity reflected in the impugned judgment rendered by the learned Single Judge in a case where judicial mind would be tempted to utilize all possible legal measures to impart justice to a man mutilated so outrageously by his cruel destiny. The High Court non suited him in exercise of a supervisory and extraordinary jurisdiction envisaged under Article 227 of the Constitution. Time and again this Court has reminded the power conferred on the High Court under Articles

226 and 227 of the Constitution is to advance justice and not to thwart it (vide State of UP v. District Judge, Unnao [(1984) 2 SCC 673: AIR 1984 SC 1401]). The very purpose of such constitutional powers being conferred on the High Court is that no man should be subjected to injustice by violating the law. The lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-produce of an erroneous view of law, the High Court is not expected to erase such justice in the name of correcting the error of law."

24. Therefore, according to my opinion, the Labour Court has rightly dealt with the matter comprehensively and considering each and every contention of the petitioner, the Labour Court

has given cogent reasons in support of its conclusion. It is not a perverse finding which has been given by the Labour Court. On the contrary, this view is based on legal evidence which are on record. Therefore, according to my opinion, the Labour Court has not committed any error which requires any interference by this Court while exercising the power under Article 227 of the Constitution of India. This Court is having very limited jurisdiction under Article 227 of the Constitution of India, cannot act as an appellate authority. This Court cannot re-appreciate the evidence which has been appreciated by the Labour Court. In case when two views are possible, even though interference by this Court is unwarranted under Article 227 of the Constitution of India. This view has been taken by the Apex Court in case of Indian Overseas Bank Vs. I.O.B. Staff Canteen Workers' Union and another, reported in AIR 2000 SC 1508. Relevant observations are in Para.19 which is quoted as under :

“19. The learned single Judge seems to have undertaken an exercise, impermissible for him in exercising writ jurisdiction, by liberally reappreciating the evidence and drawing conclusions of his own on pure questions of fact, unmindful, though aware fully, that he is not exercising any appellate jurisdiction over the awards passed by a Tribunal, presided over by a Judicial Officer. The findings of fact recorded by a fact-finding authority duly constituted for the purpose and which ordinarily should be considered to have become final, cannot be disturbed for the mere reason of having been based on materials or evidence not sufficient or credible in the opinion of the writ Court to warrant those findings at any rate, as long as they are based upon some material which are relevant for the purpose or even on the ground that there is yet another

view which can be reasonably and possibly one taken. The Division Bench was not only justified but well merited in its criticism of the order of the learned single Judge and in ordering restoration of the Award of the Tribunal. On being taken through the findings of the Industrial Tribunal as well as the order of the learned single Judge and the judgment of the Division Bench, we are of the view that the Industrial Tribunal had overwhelming materials which constituted ample and sufficient basis for recording its findings, as it did, and the manner of consideration undertaken, the objectivity of approach adopted and reasonableness of findings recorded seem to be unexceptionable. The only course, therefore, open to the writ Judge was to find out the satisfaction or otherwise of the relevant criteria laid down by this Court, before sustaining the claim of the

canteen workmen, on the facts found and recorded by the fact-finding authority and not embark upon an exercise of re-assessing the evidence and arriving at findings of ones own, altogether giving a complete go-bye even to the facts specifically found by the Tribunal below.

25. Hence, there is no substance in the present petition. Accordingly, present petition is dismissed with cost quantified at Rs.10,000/- which will have to be paid by the Corporation to the respondent workman by account payee cheque in the name of BUDHABHAI KAMJIBHAI NIZAMA within a period of one month from the date of receiving the copy of this order. Rule is discharged. Interim relief, if any, stands vacated.

(H.K.RATHOD,J.)

(vipul)